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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Review of the Pioneer's Preference Rules	)	ET Docket No. 93-266
	)	

TO: The Commission

COMMENTS OF PAGING NETWORK, INC.

PAGING NETWORK, INC.

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November 15, 1993

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SUMMARY

PageNet strongly agrees with the FCC's suggestion that the pioneer's preference rules should be repealed. Authorized by the recent Budget Act, competitive bidding will remove the cost and uncertainty which plagues the pioneer's preference regime, and it will ensure that licenses are awarded to those entities who will use the spectrum most effectively to serve the public. Competitive bidding achieves the goals of the pioneer's preference rules far better than the pioneer's preference rules themselves.

In addition, the pioneer's preference rules were flawed in theory and unworkable in practice. Ironically, those rules created disincentives for parties to deviate from technology which they included in a pioneer's preference request or for which they were awarded a preference and ultimately a license. Moreover, the pioneer's preference regime was so complex and resulted in such infrequent preferences that the Commission did not succeed in creating positive incentives for innovators. In practice, the Commission experienced considerable difficulty in comparing and assessing the competing pioneer's preference requests.

PageNet strongly opposes the FCC's expressed intention of permitting Mtel to retain its narrowband PCS preference. Under established precedent, the FCC has legal authority to change the eligibility rules to the detriment of pending applications. Moreover, equitable considerations merit consideration only insofar as they affect the public interest. The FCC grandfathers

service providers in order to prevent disrupting service to end users or an ongoing business. Mtel qualifies on neither count.

Mtel has established no equities in favor of retaining its preference. Mtel received the preference only four months ago and only a few weeks before Congress adopted the Budget Act. It has not yet survived FCC reconsideration or judicial review. Mtel has expended no more resources than other narrowband PCS parties who requested pioneer's preferences. Removal of the preference does not prevent Mtel from obtaining a license, as Mtel can participate fully in the competitive bidding next year.

Permitting Mtel to retain its preference would disserve the public interest. If Mtel receives a license which it might not have obtained through competitive bidding, then the preference would have ensured a sub-optimal use of the spectrum. The only way to know for sure whether Mtel merits a license is to make the competitive bidding a level playing field with its rivals.

If the FCC determines that it cannot or will not impose a licensee fee upon Mtel, then it is imperative that the FCC remove the preference. Giving Mtel a free license, while other parties pay upwards of $50 million for a license, would create enormous cost structure disparities and undermine narrowband PCS competition. Such a disparity would depress the value of the remaining narrowband PCS licenses and reduce the funds paid in to the U.S. Treasury. Moreover, Mtel would have a built-in auction advantage to acquire an additional two licenses. In effect, Mtel would be able to "spread" the costs of additional licenses over the 50 KHz channel it received for free. Thus, permitting Mtel to have a license for free will effectively permit Mtel to seize 27% of the narrowband PCS spectrum at a significant cost advantage.

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Paging Network, Inc. ("PageNet"), by its attorneys, submits these comments on the Notice of Proposed Rulemaking (FCC 93-477) [hereinafter "Notice"] released on October 21, 1993 in the above-captioned proceeding. PageNet strongly supports the Commission's suggestion that the pioneer's preference rules should be repealed given its new statutory authority to assign licenses through competitive bidding. However, PageNet opposes the Commission's stated intention to grandfather the pioneer's preference awarded to Mobile Telecommunication Technologies Corporation ("Mtel"). There is no legal compulsion or equitable basis to grandfather Mtel's preference; the Commission would only succeed in undermining the narrowband PCS market structure and the competitive bidding rules proposed in PP Docket No. 93-253. Moreover, granting a license to Mtel of the size and scope currently envisioned by the Commission, now that auctions will more effectively allocate licenses, will thwart free market forces, putting an entire competitive industry at disadvantage.

I. THE COMMISSION SHOULD REPEAL THE PIONEER'S PREFERENCE RULES

As the Notice recognizes, the Commission adopted the pioneer's preference rules in order to provide an additional incentive for private parties to develop new technologies and services.[1] This action was facially incompatible with its commitment to "allow free markets to determine the success or failure of technologies," and its recognition that the creation of "special incentives could thwart the development of useful alternative technologies."[2] In other contexts, the Commission has long recognized that it "should not be in the business of selecting, or even favoring a particular technology or network architecture."[3] The Commission departed from its established policy of non-market intervention in this singular instance because it perceived that its existing licensing mechanisms (i.e., lotteries and comparative hearings) stood between innovators and the marketplace. Those mechanisms were costly and created uncertainty whether an innovator could obtain the license necessary to enter the market. By awarding a pioneer's preference

1 See Establishment of Procedures to Provide a Preference, 6 FCC Rcd 3488 (1991) [hereinafter "Report and Order"], recon., 7 FCC Rcd 1808 (1992) [hereinafter "Reconsideration Order"], further recon., 8 FCC Rcd 1659 (1993) [hereinafter "Further Reconsideration Order"].

2 See, e.g., Telephone Company--Cable Television Cross-Ownership Rules, Sections 63.54 - 63-58, 7 FCC Rcd 5781, 5835-36 (1992) (Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking).

3 Action in Docket Case: Commission Proposes Video Dialtone Policy; Interexchange Carriers Not Subject to Telco-Cable Restrictions, CC Docket No. 87-266, 1991 FCC LEXIS 5587, at *5 (October 24, 1991) (statement of Sherrie P. Marshall.

to innovators who met certain standards, the Commission sought to guarantee that the innovator would receive a license to provide the service and thus could participate in the market.

The Notice recognizes that the recent Budget Act[4] achieves the Commission's objectives far better than the pioneer's preference rules. The Budget Act authorizes the Commission to award licenses directly to innovators through competitive bidding. The Commission recently adopted a Notice of Proposed Rulemaking in PP Docket No. 93-253 to implement competitive bidding.[5] With competitive bidding, the Commission effectively removes its regulatory process as a barrier between the innovator and the marketplace. The cost and uncertainty which the Commission sought to mitigate by adopting the pioneer's preference rules are virtually eliminated by competitive bidding. As the Notice concluded (at ¶ 7):

> "under this new scheme the value of innovation may be considered in the marketplace and measured by the ability to raise the funds necessary to obtain the desired license(s). Thus, we are concerned that competitive bidding authority may have undermined the basis for our pioneer's preference rules."

PageNet agrees with the Commission that competitive bidding has removed the need for the pioneer's preference rules. Had the Budget Act been passed while the Commission was

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4 See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 387, enacted Aug. 10, 1993 [hereinafter "Budget Act"].

5 See Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, FCC 93-455, rel. Oct. 12, 1993 (Notice of Proposed Rulemaking) [hereinafter "Competitive Bidding NPRM"].

considering the pioneer's preferences rules, the Commission would never have adopted those rules. Put simply, competitive bidding achieves the purposes for which the pioneer's preference rules were adopted far better than the rules themselves. Competitive bidding will be "simple and easy to administer"[6] and maximizes the value of scarce spectrum by giving licenses to parties who will use that spectrum most effectively to serve the public. There is no longer any need for the pioneer's preference rules and they should be repealed.

PageNet also believes that the pioneer's preference rules should be repealed because they were flawed in theory and unworkable in practice. First, the rules assume that the Commission is competent to substitute its judgment for the marketplace. Under the unique circumstances the Commission faced - where innovators had to wait years to obtain licenses through the comparative process, or the lottery aftermarket, it may have been rational for the Commission to make the effort. But there are no substitutes for the marketplace's judgment. Further, both as applied and as proposed, the Commission is looking solely at technology, *per se*. But technology for technology's safe is worthless. The value of technology lies in the extent to which it is utilized by the public or segments of the public. Utilization in turn depends on the demand for competing technologies, the prices at which all technologies are available, and numerous other factors. Under the best circumstances, a technology the

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[6] See Competitive Bidding NPRM at ¶ 18.

Commission decides is innovative today may be a dinosaur even before the technology is introduced.

Second, it has been far more difficult than the Commission first imagined to determine which parties should, and should not, receive preferences. Historically, as noted, the Commission has been reluctant to judge or compare technologies to determine which one is "better" or which one will meet customer needs most efficiently. The Commission is even less equipped to determine which technologies will be succeed or fail in the marketplace. In the realm of pioneer's preferences, the Commission was forced to arbitrate among numerous innovators and experts who disagreed with each other about the innovativeness, feasibility and usefulness of each other's technologies. The Commission found itself conducting a complex comparative hearing, albeit writ small, to resolve the competing and conflicting requests of parties for pioneer's preferences.

It is simpler and far more effective for the Commission to rely upon the marketplace to make the necessary comparative evaluations through competitive bidding. As the Commission recently noted, "[a]bsent market failures, the parties that value licenses the most should generally best service the public and make rapid and efficient use of the spectrum."[7] In the end, what is important is not which party has developed an innovation or

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7 Competitive Bidding NPRM at ¶ 34. In addition, parties need not disclose sensitive data publicly in order to obtain a license through competitive bidding. They can enter into protective agreements as necessary to ensure the selective dissemination of proprietary data within the financial community.

which party has the newest technology, but which party can provide the best service to the public most efficiently using scarce spectrum. Competitive bidding does not lose sight of the forest for the trees.

Third, although the rules were designed to provide incentives for innovation, they contained strong countervailing disincentives. In particular, once a party requested a pioneer's preference for a particular innovation, the party was effectively committed to that innovation. Even if subsequent research indicated that the innovation was less useful, or disclosed a better innovation, the party's strongest incentive would be to proceed with the original idea rather than abandon its request for a pioneer's preference. As a result, the Commission's pioneer's preference process actually created disincentives to innovate.

Even after a party obtained a pioneer's preference and ultimately a license, it would still have incentives to continue with the original proposal rather than use newer and better ideas. The reason is that the party received its license without having to endure competing applications due to the original innovation. The party might legitimately feel that its use or renewal of the license would be jeopardized if it abandoned the innovation which caused it to receive the license outside of the normal process. Indeed, the Commission and other interest parties would have every right to expect the licensee to use the innovation which led to the preference or else open the license for competing applications.[8] With competitive bidding, every party will feel free at any time to use the technology which it regards as best suited to provide the best service most efficiently to the public. Innovators will not be "locked in" to outdated or less useful technology solely to protect a preference under the Commission's licensing regime.

Fourth, the pioneer's preference policy was self-defeating because it could not be implemented without a complex and detailed regulatory regime for awarding preferences. In effect, the Commission inadvertently replaced one daunting regulatory process with another. An innovator faced just as many costs and uncertainties in applying for a pioneer's preference as it did in applying for licenses pursuant to lotteries or comparative hearings.[9] The Commission itself has admitted that parties bear a "significant burden" to prove they merit a preference, and that the rules enshrine a "difficult process" that must be applied on a case-by-case basis.[10] In an effort to discourage speculative requests, the Commission repeatedly stated

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8 See "Petition for Reconsideration and Clarification of Paging Network, Inc.," GEN Docket No. 90-314 & ET Docket No. 92-100, filed Sept. 10, 1993 at 18-19. PageNet hereby incorporates that petition into this rulemaking proceeding.

9 Those uncertainties involved, inter alia, whether the party's technology qualified as an innovation; whether it was a "significant" innovation; whether the technology led to a new service or a substantial enhancement of an existing service; whether the party was responsible for the innovation; whether the innovation reasonably helped shape the new Commission rules; whether the innovation was technically feasible; and whether the party provided (or could provide) sufficiently detailed technical information to the Commission's staff.

10 Report and Order, 6 FCC Rcd at 3494.

that it would not grant preferences "casually" or "routinely."[11] What this meant in practice was that preferences were rare statistically. For narrowband PCS, the Commission granted only one of 19 requests. In this environment, it is dubious whether the pioneer's preference rules created the kind of incentives for innovators which the Commission originally intended. By contrast, competitive bidding assures parties that their innovations will receive an objective evaluation by the marketplace.

Fifth, it should not be forgotten that competitive bidding delivers monetary benefits to the public through licensing fees. By contrast, the pioneer's preference rules did not deliver such benefits and created the possibility that recipients of preferences would receive a windfall at the public's expense. Similarly, the Budget Act and the Commission's proposed rules promise to ensure meaningful participation in competitive bidding by small businesses, rural telephone companies, and businesses owned by women and minorities. The pioneer's preference rules do not facilitate such participation,[12] and the expense of preparing and litigating a formal request have seriously limited the ability of small enterprises to participate in the pioneer's preference regime.

II. THE COMMISSION SHOULD NOT GRANDFATHER MTEL'S PREFERENCE

While recognizing that the pioneer's preference rules have effectively been superseded by the Budget Act, the Notice

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[11] Id.; Reconsideration Order, 7 FCC Rcd at 1808.

[12] Report and Order, 6 FCC Rcd at 3497.

nevertheless stated the Commission's intention that Mtel should retain its preference.

> "Disposition of pioneer's preference requests in [the LEO and narrowband PCS] proceedings already were made before Congressional enactment of competitive bidding authority, and as a matter of equity, nothing in this review will affect these proceedings." Notice at ¶ 18.

At the outset, it bears emphasis that there is no legal compulsion for the Commission to grandfather Mtel's preference. In United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), the Supreme Court held that the Commission may change its eligibility rules and apply the new rules to dismiss a pending application. The Commission itself has noted:

> "The Commission is entitled to change its eligibility criteria in rulemaking proceedings as long as we provide an adequate explanation for the change. . . . [T]he fact that the change collaterally affected petitioners' expectations does not render the change retroactive, unlawful or unreasonable."[13]

The Commission has previously held that the pioneer's preference rules are eligibility rules,[14] thereby underscoring the applicability of the Storer line of cases.

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13 See Amendment of Part 22 of the Commission's Rules, 6 FCC Rcd 6185, 6193 (1991) (citation omitted); see also Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526, 1536 (D.C. Cir. 1989) ("[i]t is often the case that a business will undertake a certain course of conduct based upon the current law and will then find its expectations frustrated when the law changes").

14 E.g., Further Reconsideration Order, 8 FCC Rcd at 1659-60. Should the Commission find that the pioneer's preference is more than an eligibility rule, then the entire scheme would be unlawful under Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

The sole justification offered by the Notice for grandfathering Mtel's preference is that of equity. PageNet agrees that equitable considerations are relevant, but only insofar as they affect the public interest.[15] The Commission establishes grandfather rights in the context of communications services for two reasons, to protect consumers against service disruptions and to protect the on-going business operations of providers.

> "[T]he purpose of a grandfather provision . . . is to protect specific interests of the public and of operating stations. For the public, grandfathering provisions protect against disruptions in existing services. For the operating station, grandfathering guards against economic dislocation and protects the reliance interest of the station in the spectrum as allocated."[16]

Neither rationale applies here because Mtel does not have a license and is not providing narrowband PCS services. Removing Mtel's preference will not affect any services being provided to customers. Nor does Mtel have an "operating station" which grandfather rights are designed to protect. The Commission's established policies for granting grandfather rights do not justify a special exception permitting Mtel to retain its pioneer's preference.[17]

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15 E.g., Amendment of Parts 73 and 76 of the Commission's Rules, 4 FCC Rcd 2711, 2727 (1989).

16 See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules, 98 FCC 2d 129, 134 (1984).

17 As Justice Harlan noted his dissent in Storer on other grounds, 351 U.S. at 211, "plans for expansion of communications facilities have always had to be made subject

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PageNet also submits that Mtel has not shown any legitimate reliance interest upon its pioneer's preference. Mtel did not obtain a definitive preference from the Commission until July 23, 1993.[18] That was just four months ago and only a few weeks before Congress adopted the Budget Act. Even that preference is not final if the pioneer's preference rules or Mtel's preference fail to survive petitions for reconsideration or judicial review. Moreover, removing Mtel's preference does not prevent Mtel from obtaining one or more narrowband PCS licenses. It will be entitled to participate in the proposed competitive bidding on equal footing with other providers.

There is no reason to believe that Mtel has expended more resources than PageNet and other parties on PCS technology, service development, and the pioneer's preference proceedings. Moreover, Mtel undertook such expenditures initially without knowing whether the Commission would adopt the pioneer preference classification and certainly without knowing whether it would receive a pioneer's preference. Had the Commission never adopted its pioneer's preference rules, Mtel would have made a similar

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to the contingency that the Commission might refuse to grant the necessary license for any one of a number of reasons."

18 See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314 & ET Docket No. 92-100, FCC 93-329, rel. July 23, 1993. In an apparent desire to establish some semblance of a reliance interest as quickly as possible, Mtel has filed an application for an uncontested narrowband PCS license. See Letter from E. DeSilva, Mtel, to FCC (Oct. 28, 1993) (application attached). The Commission should not act upon Mtel's application until after the issues raised in the instant rulemaking proceeding have been fully resolved.

expenditure of resources in an effort to bring its technology to the market. Hence, Mtel has no equitable claim -- and certainly no greater claim than other parties -- to a grandfathered pioneer's preference.[19]

There is no public policy reason to grandfather Mtel's pioneer's preference. The Commission decided to grant preferences in the first instance solely to provide incentives to innovators in the face of industry burdensome Commission processes. Should the Commission repeal its pioneer's preferences rules, permitting Mtel to keep its preference under the superseded rules would not, by definition, create any incentives for other parties. Indeed, grandfathering Mtel's preference would positively disserve the public interest. The Commission proposed competitive bidding as the surest way of determining which technologies and services will best serve the public. If Mtel receives a license which it might not have obtained through competitive bidding, then the Commission will have ensured a sub-optimal use of the spectrum. The only way to know whether Mtel deserves a license is to require Mtel to participate in the competitive bidding on equal terms with all other parties. The Commission must be particularly careful due to

19 Even if its preference is removed, Mtel will still benefit from the Commission's previous determination that Mtel's Nationwide Wireless Network proposal merited a pioneer's preference under the old rules. Such an "endorsement" has already assisted Mtel in raising the capital necessary to bid on narrowband PCS licenses and in bringing the technology to the marketplace. See "Opposition of Mtel to Petitions for Reconsideration of Paging Network, Inc. and Pacific Bell," GEN Docket No. 90-314 & ET Docket No. 92-100, filed Oct. 25, 1993, at 3-4.

the scope of Mtel's pioneer's preference -- a nationwide license for approximately 9% of total nationwide narrowband PCS capacity.

Finally, removing all existing pioneer's preferences would save the parties and the Commission the time and expense of continuing to litigate pioneer's preference issues. However, if Mtel retains its preference, then parties will continue to litigate the lawfulness of that preference as well as the superseded pioneer's preference rules. While PageNet does not question the Commission's motives in adopting the pioneer's preference regime, PageNet believes that the Budget Act has established the licensing regime of the future and it is time to close the book on pioneer's preferences.

The Commission also has raised the issue of whether Mtel should receive its preference for free or whether it should pay some fee. Notice at ¶ 10. In the event the Commission determines that it lacks the authority to impose a fee upon Mtel commensurate with the auction prices paid by other narrowband nationwide applicants, (or that it will not exercise such authority as it has),[20] it becomes imperative that the Commission remove Mtel's preference. First, giving Mtel a license for free, while other parties must pay $50 million or more for a narrowband PCS license, would create an enormous cost structure disparity, thereby undermining competition and skewing the market structure.[21]

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20 PageNet does not address the question whether the Commission has authority to require Mtel to pay a fee for a license it obtains as a result of its pioneer's preference.

21 BellSouth has reportedly previously paid $30 million for a 25 KHz nationwide channel.

Mtel's potential competitors would face a severe cost-price squeeze and sharply lower earnings, as their prices would be governed by competition with Mtel even though their costs would be inflated well beyond Mtel's because of their costs of obtaining their licenses at auction fees. In addition, the lower potential earnings would cause a concomitant reduction in the perceived value of other narrowband PCS licenses, resulting in lower bids for such licenses. It is no more than common sense that giving nearly 10% of nationwide industry capacity to one market entrant outside of the competitive bidding process will have serious adverse consequences on the PCS market and the proceeds derived from competitive bidding for other licenses.

Second, giving Mtel a free license would inflate the value of additional licenses to Mtel even as it deflates the value of those licenses to other providers. To the extent Mtel could achieve economies of scale and scope by operating over several 50 KHz blocks (particularly contiguous frequencies), Mtel could achieve a far higher level of profitability for those licenses than other parties through cost averaging. Put in other words, Mtel could "spread" some portion of the fee it pays to acquire additional licenses over the 50 KHz channel it has already received for free. As a result, there is a real risk that permitting Mtel to keep its preference would give Mtel an insuperable auction advantage to obtain the maximum of three narrowband PCS licenses representing 27% of industry capacity.

Obviously, giving Mtel nearly 1/3 of industry capacity at a significant cost advantage over all other competitors jeopardizes the Commission's objectives of ensuring a diverse and competitive PCS environment. Equally obvious, such a result distorts the proposed competitive bidding process and defeats the purposes underlying the Budget Act. That process works only when all licenses are made subject to competitive bidding. There is no practical way to take one of eleven licenses out of the competitive bidding process without affecting the competitive bidding for remaining licenses.[22] The Commission should remove Mtel's preference to preserve the integrity of its PCS and competitive bidding policies.

Conclusion

For the foregoing reasons, PageNet submits that the Commission should repeal the pioneer's preference rules and decline to grandfather existing preferences.

Respectfully submitted,

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22 One possible option might be for the Commission to limit Mtel to a single narrowband PCS license in a single BTA or MTA. However, even if Mtel obtains that license for free, it will still have an enormous cost disadvantage over competing licensees in those markets to the detriment of a fully competitive narrowband PCS market.

CERTIFICATE OF SERVICE

I, Judith St. Ledger-Roty, hereby certify that a copy of the foregoing "Comments of Paging Network, Inc.," was sent by first class U.S. mail, postage prepaid, this 15th day of November, 1993 to the following:

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